No. 88-1503

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

NANCY BETH CRUZAN, by her parents and co-guardians, LESTER L. and JOYCE CRUZAN,
PETITIONERS,

VS.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, and ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,
RESPONDENTS,

VS.

THAD C. McCANSE, Guardian ad litem,
RESPONDENT.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR WISCONSIN BIOETHICISTS AND OTHER HEALTH PROFESSIONALS AS AMICUS CURIAE SUPPORTING PETITIONERS

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Interest of Amicus

Amicus is an ad hoc group of 28 Wisconsin philosophers, theologians, attorneys, physicians and nurses who teach medical ethics to medical students and/or serve as institutional ethics committee members, and who have a professional interest in medical ethics. The members believe that the individual's privacy right to refuse medical treatment is fundamental to medical ethics and good

patient care and that this right is not lost with decisionmaking incapacity, but rather is exercisable through substitute decisionmakers. Intrusions upon this right of privacy in medical treatment decisionmaking undermine crucial principles of medical ethics and the delivery of quality patient care — to the detriment of both physicians and patients.

Summary of Argument

I.

A. The federal constitutional right to privacy encompasses an individual's right to direct his or her medical care, including the withdrawal of artificial nutrition and hydration. The ability to make one's own medical decisions is an aspect of individual freedom from governmental intrusion at least as fundamental as those previously found by this Court to be within the "zone of privacy."

The interests protected by the right of privacy must be balanced, in any particular case, against competing interests of the State in order to determine whether State action or inaction impermissibly infringes the right. The only State interest implicated in the instant case is the interest in preservation of life.

B. For several reasons, the *Cruzan* court accorded undue weight to the State's interest in preservation of life. First, language in Missouri's Living Will statute and its statute regulating abortion may not be employed to magnify its interest in preserving life. Each state's interest in preserving Nancy Cruzan's life would be the same; her competing interest in directing her own medical care cannot, given the federal constitutional stature of that right, be permitted to vary in scope from state to state.

Second, the State's interest in preserving life is strongest when the State seeks to protect one who may potentially be the subject of abuse — i.e., where there exists an ulterior motive for allowing the patient to die. The *Cruzan* court itself acknowledged that no such ulterior motive lurks in the instant case; hence a major prop of the State's interest in preserving her life falls.

Finally, in the instant case, the State's interest in preservation of life is more theoretical than real in light of the clinical reality of Nancy Cruzan's persistent vegetative state. All of her cognitive function is gone, and there is no hope of any in the future. Thus,

Nancy Cruzan's life is virtually reduced to a mere biological existence, and she could understandably conclude that the burden of maintaining her corporeal existence degrades the very humanity it was meant to serve. Such a patient's condition must be clearly distinguished from that of patients with physical and mental handicaps who are considered to suffer a diminished quality of life, and whose continued existence the courts have guarded and must continue to guard vigilantly.

C. In addition to distorting the importance of the State's interest in preserving Nancy Cruzan's life, the *Cruzan* court woefully undervalued her interest in directing her own medical care. That court's unlawful disregard of the trial court's finding that Nancy Cruzan would not want to continue artificial nutrition and hydration is constitutional error because it prevents Nancy Cruzan from vindicating her right to privacy. Moreover, the *Cruzan* court paid grossly insufficient deference to the judgment of Nancy Cruzan's parents on the issue of continuation of treatment. If, as normally would be expected, an incompetent patient's family members have long-standing knowledge of her character traits, and indeed have provided the nurturing environment in which the patient developed his or her powers of private, autonomous choice, then those family members are the best candidates for implementing the incompetent patient's probable treatment wishes and thereby upholding her values. The State, which ordinarily and in this case has no knowledge of the patient's character traits, is the least likely candidate to make treatment decisions for the patient, and should be the overriding decisionmaker for an incompetent patient only as a last resort.

Finally, even in the total absence of evidence of an incompetent patient's probable treatment wishes, the surrogate decisionmaker has a duty to decide whether to withdraw treatment, and a court has the duty to review that decision based upon the patient's best interests. In an era when it is often possible to prolong mere biological existence indefinitely, societal norms recognize that a patient's best interests do not require use of every possible treatment in every situation. Thus, the best interest approach has been employed to validate termination of treatment decisions, including withdrawal of artificial nutrition and hydration.

Respect for an incompetent patient's wishes according to the foregoing principles — a respect which the *Cruzan* court declined

to extend — in no way implies that such a patient's life "is not worth living." The "quality of life" issue which so troubled the *Cruzan* court is placed in proper perspective when it is recognized that while the State may not make a treatment decision based on an individual's quality of life, *the individual may.*

II.

If the concept of an incompetent patient's rights have any meaning at all, the appropriate surrogate decisionmaker must be permitted to effectuate his or her best judgment as to what the patient's treatment wishes would be. In the instant case, Nancy Cruzan's parents and co-guardians have rendered their best judgment in that regard; they may not be constitutionally restricted, any more than the patient herself could be restricted, if competent, from giving effect to that judgment.

Argument

I. THE MISSOURI SUPREME COURT'S DECISION VIOLATES NANCY CRUZAN'S FEDERAL CONSITUTIONAL RIGHT TO PRIVACY BY HOLDING THAT THE STATE'S INTEREST IN PRESERVATION OF LIFE OVERRIDES HER RIGHT TO DIRECT HER MEDICAL CARE.

A. *Where a Permanently Unconscious Patient's Surrogate Decisionmaker Chooses to Discontinue Potentially Life-Prolonging Treatment, the State's Interest in the Preservation of Life Must be Balanced Against the Patient's Right of Privacy.*

The federal constitutional right to privacy encompasses an individual's right to direct his/her medical care, including the withdrawal of artificial nutrition and hydration. This principle, which the *Cruzan* court assumed *arguendo*, has been established by numerous state and federal courts. *See*, e.g., *Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417, 497 N.E.2d 626, 633 (1986) (artificial nutrition and hydration); *Corbett v. D'Alessandro*, 487 So.2d 368, 371-372 (Fla. App.), *review denied*, 492 So.2d 1331

(Fla. 1986) (artificial nutrition and hydration); *In re Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840, 853 (1988), *review denied* (Cal. July 28, 1988), *cert. denied*, 109 S.Ct. 399 (1988) (artificial nutrition and hydration); *In re Guardianship of Grant*, 109 Wash. 2d 545, 747 P.2d 445, 449 (1987), *modified*, 757 P.2d 534 (1988) (artificial nutrition and hydration); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, 663, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976); *In re Torres*, 357 N.W.2d 332, 339 (Minn. 1984); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417, 424 (1977); *Foody v. Manchester Memorial Hospital*, 40 Conn. Sup. 127, 482 A.2d 713, 717 (1984); *Severns v. Wilmington Medical Center, Inc.*, 421 A.2d 1334, 1347 (Del. 1980).

Although this Court has not previously decided whether the right to direct one's medical care is within a "zone of privacy" protected by the Constitution, it is inconceivable that it is not. It is difficult to imagine a more fundamental aspect of individual freedom from governmental intrusion than the ability to control what happens to one's own body. *See Gray v. Romeo*, 697 F.Supp. 580, 585 (D.R.I. 1988). That ability is even more basic to personal autonomy than a woman's ability to terminate a pregnancy, a married couple's choice of birth control, and a parent's decision regarding his/her child's education, all of which this Court has found to be within the "zone of privacy." *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Yet, the right of privacy is not absolute. The interests it protects must be balanced, in any particular case, against competing interests of the State in order to determine whether State action or inaction impermissibly infringes the right. The *Cruzan* court conceded that the only State interest implicated in the instant case is the preservation of life. *Cruzan v. Harmon*, 760 S.W.2d 408, 419 (Mo. 1988). In its analysis, the court accorded undue weight to the State's interest and insufficient weight to Nancy Cruzan's interest, and thereby sanctioned impermissible State infringement of her constitutional privacy right.

B. *The* Cruzan *Court Accorded Undue Weight to the State's Interest in the Preservation of Life.*

One factor which the *Cruzan* court erroneously relied upon in according undue weight to the State's interest in the preservation of life was language in Missouri's Living Will statute and its statute regulating abortion. These statutes, the court held, are "an expression of the policy of this State with regard to the sanctity of life" (though the court did concede that these statutes were inapplicable to the instant case). *Cruzan v. Harmon*, 760 S.W.2d at 420. The flaws in this analysis are adequately identified in Judge Blackmar's dissent. *Id.* at 428-429. Moreover, the implication that Missouri's interest in preserving life is stronger than Wisconsin's, for example, because Missouri has imposed greater restrictions on abortion and living wills, cannot stand. Each state's interest in preserving Nancy Cruzan's life would be the same; her competing interest in directing her own medical care cannot, given the federal constitutional stature of that right, be permitted to vary in scope from state to state.

In fact, the State's interest in preserving Nancy Cruzan's life is relatively weak because there is no danger that she is subject to abuse and because of the clinical reality of persistent vegetative state. In *Gray v. Romeo*, 697 F.Supp. 580, 589 (D.R.I. 1988), decided less than a month before the Missouri Supreme Court rendered its *Cruzan* decision on legally indistinguishable facts, the court noted that the State's interest in preserving life is strongest when the State seeks to protect one "who may potentially be the subject of abuse." However, since in that case the patient's family's request for termination of her artificial feeding was merely an attempt to ensure that the patient's own wishes were carried out, she did not need "protection" from the state that would counteract her wishes. Likewise in the instant case, both the trial court and the Missouri Supreme Court acknowledged that all parties had Nancy Cruzan's best interests at heart. The Missouri Supreme Court noted that she is "surrounded by the loving family with which she is blessed" and further pointed out that "no one carries a malevolent motive to this litigation. Only the coldest heart could fail to feel the anguish of these parents who have suffered terribly these many years." 760 S.W.2d at 412. No ulterior motive for Nancy Cruzan's death lurks in the instant case; hence a major prop of the State's

interest in preserving her life falls.

Furthermore, the State's interest in preserving life in the instant case approaches pure vitalism or biologism, in light of the clinical reality of persistent vegetative state. For patients such as Nancy Cruzan who are in a persistent vegetative state, all cognitive functioning is gone, and there is little hope of any in the future. According to the American Academy of Neurology, such a state is characterized by "overwhelming bilateral damage to the cerebral hemispheres to a degree incompatible with consciousness or the capacity to experience pain or suffering." *Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417, 497 N.E.2d 626, 631 n.20 (1986) (citations omitted). Nancy Cruzan, in short, is incapable of experiencing *anything*. As noted by the *Cruzan* court itself, individuals (such as Nancy Cruzan) in a persistent vegetative state must be clearly distinguished from patients with physical and mental handicaps who ordinarily are said to have a diminished quality of life and whose welfare the court rightly seeks to protect. *Cruzan v. Harmon*, 760 S.W. at 420. We need not force Nancy Cruzan to stay alive in order to protect others who are in a far different condition.

Based on those clinical characteristics of persistent vegetative state, John Paris, S.J., Associate Professor of Social Ethics at College of the Holy Cross, notes: "Those who argue that quality of life cannot be a consideration in the treatment decisions for such [persistent vegetative] patients are placing the maintenance of mere biological existence above all other considerations." J. Paris, S.J., "Critical Life Issues," 66 *Health Progress* 23 (December, 1985). Similarly, Daniel Callahan, co-founder and Director of the Hastings Center, speaking of the irreversibly comatose, argues that food and water can be stopped because "neither provides any genuine benefit; there is no meaningful life of any kind — it is a mere body only, not an embodied person." D. Callahan, "Feeding the Dying Elderly," *Generations* (Winder, 1985), p.17. The President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research stated:

> Treatment ordinarily aims to benefit a patient through preserving life, relieving pain and suffering, protecting against disability, and returning maximally effective functioning. If a prognosis of permanent unconsciousness

> is correct, however, continued treatment cannot confer such benefits. Pain and suffering are absent, as are joy, satisfaction and pleasure. Disability is total and no return to an even minimal level of social or human functioning is possible.

President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment*, 181-82 (1983).

In the judicial arena, the New Jersey Supreme Court held, in *In re Peter*, 108 N.J. 365, 529 A.2d 419, 427 (1987), that it was "difficult to conceive of a case in which the State could have an interest strong enough to subordinate a patient's right to choose not to be sustained in a persistent vegetative state." In *Eichner v. Dillon*, 426 N.Y.S.2d 517, 543 (1980), *aff'd. as modified, In re Eichner*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981), the court stated: "[T]he patient in a permanent vegetative coma has no hope of recovery and merely lies, trapped in a technological limbo, awaiting the inevitable. As a matter of established fact, such a patient has *no* health and, in the true sense, no life, for the State to protect." And in *Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417, 497 N.E.2d 626, 635 (1986), the court stated:

> [T]he State's interest in life encompasses a broader interest than mere corporeal existence. In certain, thankfully rare, circumstances, the burden of maintaining the corporeal existence degrades the very humanity it was meant to serve. The law recognizes the individual's right to preserve his humanity, even if to preserve his humanity means to allow the natural processes of a disease or affliction to bring about a death with dignity.

Under the facts of the instant case — an individual in a persistent vegetative state, with no plausible hope of recovery, and no danger of a decisionmaker who does not have the individual's best interest at heart — the State's interest in preservation of life is more theoretical than real. The State can have no real interest in a result which serves no interest of Nancy's and is contrary to her presumed wishes.

C. *The* Cruzan *Court Accorded Insufficient Weight to Nancy Cruzan's Privacy Interest in Directing Her Own Medical Care.*

While the *Cruzan* court improperly magnified the importance of the State's interest in preserving Nancy Cruzan's life, it woefully undervalued Nancy Cruzan's interest in controlling her own medical care. As Judge Higgins' dissent ably discloses (760 S.W.2d at 435-436), the *Cruzan* court unlawfully overturned the trial court's finding that Nancy Cruzan would not want to continue artificial nutrition and hydration. This failure to adhere to state law assumes the dimension of constitutional error because it prevents Nancy Cruzan from vindicating her right to privacy.

Moreover, the Missouri Supreme Court's facile disregard of evidence of Nancy Cruzan's wishes ignores reality. An incompetent patient by definition cannot express, "with certainty", his or her current wishes regarding treatment termination. Nonetheless, caregivers, families, and courts are no less obligated to respect their persons, the integrity of their lives, and their own unique identities. In the usual circumstance (such as the instant case), where the incompetent patient has not left some type of advance directive as to treatment choices such as a living will or durable power of attorney, information provided by the family must be relied upon in determining a course which will respect the integrity and unique identity of the incompetent patient. There will always be a gap between the incompetent individual's values and the understanding that the family has about them. Nonetheless, the family is normally in a good position to make decisions which promote the incompetent patient's goals and values. Not only are family members most likely to be privy to any relevant statements that patients have made on the topics of treatment or termination; in most cases, as in the instant case, family members have a long-standing knowledge of the patient's character traits and values. In addition, Nancy Cruzan's family members have shared with her experiences and circumstances that are a part of the identity of both Nancy and her family. In other words, Nancy Cruzan's family is the context in which Nancy developed her powers of private, autonomous choice; and the values she brings to such choices spring from and are intertwined with her family's values.

Due to family members' knowledge about, and intimacy and shared life experiences with an incompetent patient, they are the best candidates for implementing the incompetent patient's probable treatment wishes and upholding her values.[1] The State, on the other hand, has been privy to no conversations with Nancy Cruzan about treatment preferences (or anything else), has no knowledge of her character traits, and has had only the most remote and abstract role and responsibility in her daily life. As such, the State is the least likely candidate to make treatment decisions for her, and should be the overriding decisionmaker for any incompetent patient only as a last resort.

Even if it is assumed *arguendo* that evidence of Nancy Cruzan's probable treatment wishes is totally wanting, the Missouri Supreme Court erred in finding that the State's interest in preserving life must prevail. Case law has established that when it is not possible to discern the incompetent patient's preference regarding treatment, a court must determine whether withdrawal of treatment serves the patient's "best interest." *See, e.g., In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985). The ultimate goal of the best interests approach is to follow a course which would generally be approved by society as best serving the incompetent. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment*, 134-135 (1983). Current interpretation of the best interests approach recognizes that it does not require utilization of every possible treatment every time.

The Arizona Supreme Court, in *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987), relied on the best interests test in terminating treatment for a seventy year old patient in a chronic vegetative state who was sustained through use of a nasogastric tube. The patient had suffered several strokes and the probability that she "would ever return to a cognitive sapient state, as distinguished from a chronic vegetative existence, was virtually non-

[1] Interestingly, in coming to a decision which allowed withdrawal of Karen Quinlan's respirator, the New Jersey Supreme Court refused to consider oral statements that Karen had made prior to her illness about treatment choices and instead allowed her family members to decide to the best of their ability what her wishes would be if she were able to make her own decision. *In re Quinlan*, 355 A.2d at 664.

existent." *Id.* 741 P.2d at 689. In the absence of evidence about the patient's wishes, the court concluded that the patient's "best interests would be served by the placement and retention of the DNR [Do Not Resuscitate] and DNH [Do Not Hospitalize] orders on her medical chart." *Id.*

Similarly, the Washington Supreme Court used the best interests test as a basis for withholding treatment from an incompetent patient in *In re Guardianship of Grant*, 109 Wash.2d 545, 747 P.2d 445 (1987), *modified*, 757 P.2d 534 (1988). The patient in that case was a 22 year old woman afflicted with Batten's disease, a terminal illness that attacks the central nervous system. The disease had reduced the patient to a mental age of two to six weeks and had left her bedridden without control of her bodily functions, including walking, feeding, urinating, and bowel movements. There was only weak evidence of her wishes expressed before her incompetence at age fourteen. Nonetheless, the court approved withholding of life sustaining treatment, including artificial nutrition and hydration, on grounds of the patient's constitutional right of privacy and common law right to be free of bodily invasion. Furthermore, both the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research[2] and The Hastings Center[3] have recommended, in certain instances, the termination of treatment pursuant to the best interests test.

Both the substituted judgment and the best interests tests seek to come as close as possible to the incompetent patient's own voice regarding her medical care. Respect for the patient's wishes in no way implies that such a patient's life "is not worth living." *Cruzan v. Harmon*, 760 S.W.2d at 422. The issue of when life is or is not worth living is as fraught with controversy as the question of when life begins. The "quality of life" issue which so troubled the *Cruzan* court is placed in proper perspective when it is recognized that while the State may not make a treatment decision based on an

[2] President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment*, 134-35 (1983).

[3] The Hastings Center, *Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying*, 28 (1987).

individual's quality of life, *the individual may*. This distinction was recognized by the *Brophy* court:

> It is antithetical to our scheme of ordered liberty and to our respect for the autonomy of the individual for the State to make decisions regarding the individual's quality of life. It is for the patient to decide such issues. Our role is limited to ensuring that a refusal of treatment does not violate legal norms.

497 N.E.2d at 635.

II. NANCY CRUZAN'S CONSTITUTIONAL PRIVACY RIGHT TO DIRECT HER OWN MEDICAL CARE DEMANDS THAT HER GUARDIAN BE PERMITTED FULLY TO EFFECTUATE HER WISHES.

That Nancy Cruzan is incompetent to make decisions about her care, and will remain so, is undisputed by the parties. As it is necessary for such decisions to be made, someone else must make them. Therefore, her undeniable right to direct her care must be exercised by such surrogate decisionmaker: "The only practical way to prevent destruction of the right is to permit the guardian and family . . . to render their best judgment, subject to the qualifications hereinafter stated [i.e., the unlikelihood of resuming a cognitive, sapient life], as to whether she would exercise it in these circumstances." *In re Quinlan*, 355 A.2d at 664.

In this case, Nancy Cruzan's parents, who are also her co-guardians, have rendered their best judgment as to what their daughter's treatment wishes would be. If the concept of an incompetent patient's rights has any meaning at all, the co-guardians must be permitted to effectuate that judgment. As noted by the court in *Foody v. Manchester Memorial Hospital*, 40 Conn. Sup. 127, 482 A.2d 713, 718 (1984): "To deny the exercise because the patient is unconscious is to deny the right."

Conclusion

As is eminently clear in Nancy Cruzan's case, the biotechnological revolution has magnified the interdependence of

legal, medical and ethical decisionmaking in cases involving treatment termination. For the foregoing reasons, set forth by amicus — a group representative of legal, medical and ethical thought — the judgment of the Missouri Supreme Court should be reversed.

Respectfully submitted,

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